BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

JOHNNY G. PHILPOTT	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,035,140
PRESTIGE CABINETS	)	
Respondent	)	
AND	)	
	)	
TRAVELERS PROPERTY CASUALTY CO. OF AMERICA	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the February 20, 2012 Award of Administrative Law Judge (ALJ) Thomas Klein. The Board heard oral argument on May 16, 2012, in Wichita, Kansas.

APPEARANCES

William L. Phalen, of Pittsburg, Kansas, appeared for claimant. Ali N. Marchant, of Wichita, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the entire record and adopted the stipulations listed in the Award.

The submission letters of both counsel refer to claimant's August 30, 2007 deposition and to the April 1, 2009 preliminary hearing transcript as being part of the evidentiary record. In the award, the ALJ also lists both proceedings as part of the record. Accordingly, they were likewise considered by the Board. However, there is no specific stipulation that the medical exhibits offered into evidence at the preliminary hearing are to be included in evidence for purposes of the final award. The Board has accordingly reviewed the testimony in both transcripts, but not the exhibits to the preliminary hearing

transcript other than the two reports by Dr. Khan. Since the two reports of Dr. Khan, included in Claimant's Ex. 2 to the preliminary hearing, resulted from a court-ordered IME[1], then Dr. Khan's reports are automatically part of the record and were accordingly considered by the Board.[2]

ISSUES

The Administrative Law Judge found claimant sustained a compensable personal injury by accident on March 16, 2007.[3] The accident consisted of claimant's daily exposure to dust and various chemicals. The alleged injury was severe pulmonary dysfunction. The ALJ found that although claimant's workplace exposure served to aggravate claimant's preexisting chronic obstructive pulmonary disease (COPD), the aggravation was temporary only. The ALJ's Award was accordingly limited to the treatment claimant previously received from Dr. Daniel D. Doornbos, a physician board certified in pulmonary medicine.

Claimant requests review of whether he is entitled to permanent disability benefits as a consequence of his alleged accidental injury of March 16, 2007. Claimant asserts the ALJ erred in finding that he suffered no permanent injury as a result of his chemical and dust exposure and maintains the Award should be modified, and the Board should find claimant sustained a 51 percent permanent partial impairment of function to the body as a whole for his severe COPD, which claimant alleges was permanently aggravated by the chemicals and dust to which he was exposed. Claimant further advances the position that he is permanently disabled from performing any substantial and gainful employment and is therefore entitled to compensation of permanent total disability benefits (PTD). In the alternative, claimant argues he is entitled to permanent partial disability benefits (PPD) based on an 83 percent work disability.

Respondent argues that claimant has not met his burden of proving that he sustained personal injury by accident arising out of and in the course of his employment with respondent. Respondent also contends that claimant did not prove that any permanent aggravation, permanent injury, or permanent disability resulted from his employment with respondent.

The issues presented for Board review are:

(1) Whether claimant sustained personal injury by accident arising out of and in the course of his employment with respondent;

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[1] P.H. Trans. at 5.

[2] K.S.A. 44-516.

[3] Claimant actually alleged a series of repetitive traumas each and every working day ending on March 16, 2007, when claimant's employment with respondent was terminated. P.H. Trans. at 7-8.

(a) Whether claimant's COPD was aggravated, either on a temporary or a permanent basis, by claimant's workplace exposure to dust and chemicals;

(2) The nature and extent of claimant's disability, including whether claimant sustained permanent impairment of function, work disability, or permanent total disability as a consequence of claimant's accidental injury.

FINDINGS OF FACT

Claimant is approximately 46 years old. He uses an inhaler several times a day to treat his shortness of breath. Claimant, a former two pack a day tobacco smoker, began smoking when he was seven years old and continued to do so for 28-31 years. He smoked "roll your own" unfiltered cigarettes as well as filtered Marlboro's. Claimant testified he quit smoking in 2003, due to lack of money,[4] however, the record is unclear whether claimant has actually quit smoking, and if so when and for how long.

Claimant and his wife live together in a trailer home. According to claimant, neither he nor his wife smoke. Mr. Philpott claims, however, that he and his wife have friends who come over and smoke at their residence, "[p]retty much"[5] on a daily basis. Although claimant experienced difficulty breathing when his "friends" smoked in his trailer, claimant provided no explanation why he allowed himself to be exposed to cigarette smoke given his severe pulmonary disease and the difficulty breathing claimant says he began experiencing in December 2006.

Claimant began working for respondent on July 2, 2004. Claimant first noticed he was having shortness of breath when he was changing filters in the "glaze room." The glaze room is a room within respondent's facility in Neodesha, Kansas, where cabinets are repaired and sanded and where paints, enamels, and other chemicals are applied to cabinets. Claimant's job was to clean the glaze room. To accomplish the job, claimant was required to change filters several times per shift. There were seven paint booths in the glaze room and each had a filter which, when changed, smelled strongly of chemical fumes and dust. Claimant was required to compress the dirty filters and place them into barrels for disposition as hazardous material. Sanding the wood cabinets also occurred in the glaze room, thus exposing claimant to airborne dust, in addition to paint and enamel fumes. Claimant's duty of cleaning the glaze room included mopping, sweeping up dust, and placing it into containers. The dust too was treated as hazardous material. Claimant was also exposed to acetone, a chemical used in the mopping process.

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[4] Claimant's Depo. at 5.

[5] Claimant's Depo. at 7-8.

Claimant testified that the acetone had a strong odor and he spent the majority of his workday around it. Claimant was provided with dust masks when he began to have breathing difficulties in 2006. Despite his use of dust masks, he could still smell the chemical fumes. He could also taste the chemicals through the masks and could feel the chemicals entering his lungs. Claimant used four to five masks per shift. Claimant testified that there was a visible haze in the glaze room from the spraying.

Claimant reported his breathing difficulties to his supervisor Jon Alloway. Mr. Alloway told claimant to wear a mask and go to the doctor. Claimant went to see a physician's assistant, Marc Hoffmeister. Claimant testified that Mr. Hoffmeister thought he had pneumonia or bronchitis. Claimant was prescribed medication, which did not help.

On occasion, claimant had to leave work early because of his breathing problems. Around January 2007, claimant was transferred to another job. The new position required claimant to dump barrels and cut cinder blocks. Most of the new job was performed outside. For some of the block work claimant had to go inside, obtain materials, and use a scrap grinder. Claimant wore a mask when he was inside. According to claimant, the outside job exposed him to more dust than the job in the glaze room. Claimant talked with Mr. Alloway about transferring back to his old department, but was told that would not be possible. Mr. Hoffmeister advised claimant to take some time off work.

Claimant continued with his treatment and took medical leave for a period of time prior to his termination on March 16, 2007. Pulmonary function studies conducted on April 20, 2007 revealed severe COPD. Claimant continued to see Mr. Hoffmeister until May 2007, when he no longer had the money to provide his own treatment. Claimant returned to work for respondent and was told that he could not work because he had felony convictions and because of his pulmonary condition.[6] Claimant testified that respondent knew about his felony convictions when he was hired in 2004.

Claimant testified he had no problems breathing before he went to work for respondent.

After claimant was terminated, he was referred to Dr. Sohail Khan on May 22, 2008. The ALJ originally appointed Dr. William Barkman, a pulmonologist at the KU Medical Center, to perform a neutral medical evaluation. However, when Dr. Barkman declined to perform the court-ordered IME, the parties apparently agreed to have Dr. Khan perform the neutral evaluation.[7] Dr. Khan examined claimant and noted claimant had a history of tuberculosis for which claimant underwent six months of treatment. Dr. Khan requested

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[6] P.H. Trans. at 14.

[7] There is no Order or amended order in the record appointing Dr. Khan to perform the IME, however, see P.H. Trans. at 4-6.

that respondent provide him material safety data sheets (MSDS) for the substances to which claimant's job exposed him. According to Dr. Khan's initial report, claimant quit smoking in 2005. Dr. Khan recommended a number of diagnostic tests, including repeat pulmonary function studies. Claimant returned for a follow up visit with Dr. Khan on July 29, 2008. By this time the diagnostic testing had been performed and the doctor had received the MSDS. Dr. Khan concluded:

> The patient's pulmonary function tests were personally reviewed by me - The patient has obstructive airway disease. The obstruction is severe, based on FEV_1, which is 1.01 liters; this is 26% of the predicted value. Post bronchodilator, the FEV_1 increased significantly. The patient's airway obstruction is reversible. Lung volumes are suggestive of hyperinflation with air trapping. The diffusion capacity is relatively well preserved. (Please see the separately dictated note on pulmonary function tests for full discussion).[8]
>
> Historically, the patient's symptoms have worsened related to his work environment, however, I do not have any evidence to suggest that there is a cause-and-effect relationship between his lung disease and workplace. In my opinion, the patient had the above-mentioned lung condition before he started working at the workplace. His symptoms might have been worsened by respiratory irritants at the workplace; however, as mentioned above, a cause-and-effect relationship between his respiratory symptoms and his workplace would be highly unlikely.[9]

Claimant alleged the current symptoms he attributes to his chemical and dust exposure include wheezing, shortness of breath, coughing, and spitting up mucus. Claimant reported that he could stand for no more than 15 minutes before becoming out of breath. Claimant does not believe he can physically work.

Claimant was seen by Dr. Daniel C. Doornbos on April 26, 2009, pursuant to an order of the ALJ for a neutral medical evaluation. Dr. Doornbos requested he be provided with the relevant MSDS, but was not provided with that information until after his reports were generated, but before his deposition.

Dr. Doornbos noted that, although claimant told him he quit smoking in 2003, the doctor reviewed medical records indicating claimant had just quit in 2007. Claimant also told Dr. Doornbos he was exposed to extensive secondhand smoke. Dr. Doornbos' principle diagnoses were severe obstructive pulmonary defect, substantial obesity contributing to loss of breath on exertion, and a substantial degree of gastroesophageal reflux due to obesity. Dr. Doornbos felt that there was a small possibility that at least some of claimant's disabling COPD could be due to workplace exposure if claimant had been

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[8] P.H. Trans., Cl. Ex. 2 at 6 (Dr. Khan's July 29, 2008 office note).

[9] P.H. Trans., Cl. Ex. 2 at 7 (Dr. Khan's July 29, 2008 office note).

exposed to substances like toluene discoyanate or an equivalent sensitizer. However, it is likely within reasonable medical probability that claimant's disability is due to the cumulative effects of his years of smoking and not due to any permanent effects claimant may have suffered as a result of any exposures he may have had in his workplace.[10]

Dr. Doornbos opines:

> While I am willing to concede that exposure to certain organic chemicals and/or dusts during the time of the patient's employment may have led to a temporary irritation of his airways and may have been the "last straw" that unmasked what had already been progressive emphysema in his lungs, I simply have inadequate data to allow me to conclude authoritatively that there was any permanent damage caused by any workplace exposure he may have sustained.[11]

Dr. Doornbos had several more office visits with claimant for treatment. The diagnoses did not change. In his last office visit with claimant, on July 9, 2010, claimant admitted to Dr. Doornbos that he continued to smoke since his previous visit on September 15, 2009. The record is not clear whether claimant never did quit smoking or whether he quit at some point and then resumed the habit.

Dr. Doornbos testified that there can be situations where an exposure to an environmental insult is so severe that it can by itself produce permanent damage, but he has not been provided information that would substantiate that such a severe exposure occurred in claimant's case.[12]

Dr. Doornbos found claimant sustained a 51 to 100 percent permanent functional impairment, consistent with a Class IV rating level according to the 4th edition of the AMA *Guides.*

Mary Lynn Sylvester, a school psychologist since 1983, testified that she administered an IQ test to claimant on October 1, 2009. The testing results revealed that claimant's academic skills were within the low range of others in his age group. Claimant read at a first grade level, demonstrated math skills of a sixth grader, and used language skills at a first grade level. Ms. Sylvester testified claimant's IQ score was 88, which places him in the 21st percentile. Ms. Sylvester conceded that it is possible claimant was having a bad day when he was tested and that could account for his low numbers.

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[10] Doornbos Depo. at 10-11.

[11] Doornbos Depo., Ex. 2 at 13 (Dr. Doornbos April 23, 2009 report at 5).

[12] Doornbos Depo. at 20.

Claimant was examined, at the request of claimant's counsel, by Dr. Pedro Murati, a physiatrist, on July 25, 2007. Claimant's complaints included severe headaches, shortness of breath, wheezing, and chronic coughing. Dr. Murati diagnosed severe COPD. Dr. Murati acknowledged that although claimant denied he smoked his clothing had a strong odor of smoke. Claimant told Dr. Murati "that everyone who comes to his house smokes in the house,"[13] and that is why he smelled of smoke. Dr. Murati was evidently unaware of claimant's history of tuberculosis.

Dr. Murati opined that his diagnosis was, within reasonable medical probability, a direct result of the March 16, 2007, work-related injury. Dr. Murati felt that at the very least the COPD was permanently aggravated by claimant's workplace exposure. He told claimant he could continue to work as tolerated and to use common sense.

Dr. Murati performed a second examination on August 27, 2009, at the request of claimant's counsel. On this occasion, claimant complained of shortness of breath, wheezing, and chronic coughing. Dr. Murati noted that claimant's cough had improved, but Dr. Murati again found claimant smelled of smoke. Dr. Murati's diagnosis remained severe COPD and he continued to opine the diagnosis was a direct result of the March 16, 2007, work-related accident. Dr. Murati instructed claimant to avoid all smoke and solvents and advised claimant to apply for Medicare health coverage. Dr. Murati found claimant had a 51 percent whole person permanent impairment of function based on the results of claimant's pulmonary function testing.

Dr. Murati reviewed the material from Mary Sylvester's IQ evaluation and the report of vocational rehabilitation consultant Karen Terrill. Dr. Murati testified that claimant is permanently and totally disabled as a result of his work injury. In the alternative, based on the information available to Dr. Murati, including the work tasks identified and described by Ms. Terrill as having been performed by claimant in the 15-year period preceding the alleged injury, Dr. Murati concluded claimant could no longer perform 18 of the total of 27 tasks resulting in a 66 percent task loss.

Dr. Pedro Murati was deposed twice, July 12, 2010 and November 17, 2010. He testified that after his first deposition he reviewed an Industrial Hygiene Report conducted for respondent on August 7, 2007. The apparent purpose of the study was to determine whether respondent did or did not have acceptably safe levels of wood dust and acetone vapors in its Neodesha, Kansas facility.

The report confirmed the presence of wood dust and acetone vapors in excess of acceptable levels. Dr. Murati opined that he would not recommend anyone work in the environment described in the report due to the poor air quality.

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[13] Murati Depo (July 12, 2010), Ex. 2 at 2 (Dr. Murati's July 25, 2007 IME report).

Dr. Murati found the results of the report support his opinion that claimant's work environment caused his breathing issues. Part of the study focused on testing of three particular employees. The testing revealed that all three employees had more than twice the safe limit of wood dust in their systems.[14] Dr. Murati admitted that the employees who were tested did not work in a janitorial capacity as claimant did.[15]

Dr. Murati once again opined that claimant's exposure to "bad air quality" aggravated his COPD, but was not its cause.[16] He also opined that smoking aggravated claimant's COPD. He felt the air quality reflected in the Industrial Hygiene Report could cause an individual to develop COPD.[17] Dr. Murati admitted that claimant's continuing to smoke could permanently aggravate claimant's COPD.

Claimant was examined by Dr. John McMaster at respondent's request on October 5, 2010. Claimant complained of shortness of breath with minimal exertion, coughing, and facial redness.

Dr. McMaster diagnosed severe COPD, obesity, and depression. He opined that claimant's work only exacerbated his preexisting condition. He opined claimant's work caused a transient worsening of his long-standing pre-existing COPD. Dr. McMaster attributed claimant's COPD to claimant's long-standing chronic use of and exposure to tobacco.[18] He recommended claimant avoid exposure to tobacco smoke and other known pulmonary irritants within the home, as well as in recreational and work environments.

Dr. McMaster felt that claimant was at maximum medical improvement and assigned a 51 percent whole person impairment of function due to COPD. He found that 0 percent functional impairment can be identified as occupationally induced or causally related to claimant's employment.

Dr. McMaster found conflicting information regarding whether claimant had quit smoking and, if he did quit, when he did so. Claimant was adamant that he quit smoking in March 2003, but his medical records noted that claimant continued to use tobacco after he said he stopped.

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[14] Murati Depo. (Nov. 17, 2010) at 17.

[15] Murati Depo. (Nov. 17, 2010) at 23.

[16] Murati Depo. (Nov. 17, 2010) at 27.

[17] Murati Depo. (Nov. 17, 2010) at 31.

[18] McMaster Depo. at 24.

PRINCIPLES OF LAW AND ANALYSIS

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[19] Whether an accident arises out of and in the course of the worker's employment depends upon the facts associated with each case.[20]

K.S.A. 2006 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2006 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 2006 Supp. 44-508(d) provides in relevant part:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

K.S.A. 2006 Supp. 44-508(e) defines "personal injury" and "injury":

> "Personal injury" and "injury" mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker's usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

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[19] K.S.A. 2006 Supp. 44-501(a).

[20] *Halford v. Nowak Construction Co.*, 39 Kan. App. 2d 935, 186 P.3d 206, *rev. denied* 287 Kan. 765 (2008).

> The phrase "out of" employment points to the cause or origin of the worker's accident and requires some causal connection between the accidental injury and the employment. An injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the worker's accident occurred and means the injury happened while the worker was at work in the employer's service.[21]

K.S.A. 2000 Furse 44-510e(a) states in part:

> Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

An accidental injury is compensable under the Workers Compensation Act even where the accident only serves to aggravate a preexisting condition.[22] The test is not whether the accident causes the condition, but whether the accident aggravates or accelerates the condition.[23]

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[21] *Kindel v. Ferco Rental, Inc*., 258 Kan. 272, 899 P.2d 1058 (1995); *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 955 P.2d 1315 (1997).

[22] *Odell v. Unified School District*, 206 Kan. 752, 758, 481 P.2d 974 (1971).

[23] *Woodward v. Beech Aircraft Corp.*, 24 Kan. App. 2d 510, Syl. ¶ 2, 949 P.2d 1149 (1997).

K.S.A. 2000 Furse 44-510c(a)(2) provides:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

An injured worker is permanently totally disabled when rendered "essentially and realistically unemployable."[24]

The Board agrees with the ALJ that claimant likely sustained personal injury by accident arising out of and in the course of his employment with respondent, however, the preponderance of the credible evidence does not support that any permanent injury or permanent aggravation of claimant's preexisting COPD resulted from claimant's exposure to dust and acetone fumes working for respondent. Rather, the evidence strongly supports the finding that any aggravation of, acceleration of, or contribution to, claimant's COPD caused by claimant's dust and chemical exposure at respondent was of a temporary nature only and that claimant's permanent injury is solely the result of claimant's lengthy history of inhaling tobacco smoke.

The evidence establishes that claimant developed COPD as a direct consequence of his use of tobacco. The COPD probably preexisted the commencement of claimant's employment with respondent in 2004. It is particularly noteworthy that claimant smoked for period of approximately 28-31 years, beginning at age seven, at the rate of two packs per day. Moreover, claimant smoked, in addition to filtered Marlboro's, unfiltered "roll your own" cigarettes.

The claimant's veracity has been called into serious question in this claim. The evidence is difficult or impossible to reconcile regarding if claimant had quit smoking and, if he did quit, when that event occurred. Claimant maintains adamantly that he quit smoking in 2003. However, the medical evidence does not support claimant's testimony. There is evidence that claimant quit smoking in 2005 or 2007. There is evidence from Dr. Doornbos that claimant admitted to him on July 9, 2010, that he was continuing smoke. The reliability of claimant's testimony is further impaired considering that he testified and told Dr. Murati that he didn't smoke but that "everyone" who comes to claimant's trailer is allowed to smoke in the residence. It seems highly improbable that claimant and his wife, with whom he shared a trailer home, would allow unrestricted smoking where they lived,

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[24] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

given claimant's severe COPD and his symptoms including difficulty breathing, for which claimant had to use an inhaler multiple times per day; wheezing; shortness of breath with and without exertion; and chronic coughing.

In Dr. Murati's second deposition he testified he was "not surprised"[25] that claimant admitted to Dr. Doornbos in July 2010 that he continued to smoke.

The medical opinions expressed by Dr. Khan, Dr. McMaster, and Dr. Doornbos, as detailed above, all support the holding of the ALJ that claimant's exposure to dust, paint and enamel fumes, served to only temporarily aggravate claimant's preexisting COPD. Where the permanency of a disease or condition does not result from the work-related injury, the employer is not liable for the permanent disability.[26] The Board concludes that the permanency of claimant's preexisting COPD was temporarily aggravated by claimant's work for respondent and therefore, respondent is not liable for any form of permanent disability benefits in this claim. Given the Board's findings and conclusions, the issues raised regarding the nature and extent of claimant's disability are moot and will not be addressed by the Board.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Thomas Klein dated February 20, 2012, is hereby affirmed in all respects.

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[25] Murati Depo. (Nov. 17, 2010) at 27.

[26] *Kotnour v. City of Overland Park*, 43 Kan. App. 2d 833, 233 P.3d 299 (2010), *rev. denied* ___ Kan. ___ (2012); *West-Mills v. Dillon Companies, Inc.*, 18 Kan. App. 2d 561, 859 P.2d 382 (1993).

IT IS SO ORDERED.

Dated this _____ day of July, 2012.

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BOARD MEMBER

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BOARD MEMBER

_____
BOARD MEMBER

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Thomas Klein, Administrative Law Judge